IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition No.2490 of 2006

Bharati Rajendra Kumar Bhutada. .. .. Petitioner
(wife of the detenu)

Versus

1. The State of Maharashtra,
through the Secretary to thereafter
Govt. of Maharashtra, Home Dept.,
Mantralaya, Mumbai.

2.Chandra Ieyngar
Principal Secretary (Appeal and Security)
Govt. of Maharashtra, Home Dept. and
Detaining Authority, Mantralaya,
Mumbai.

3. The Superintendent of Prison,
the Mumbai Central Prison,
Arthur Road, Mumbai.

4. The Superintendent of Prison,
Nashik Road, Central Prison,
Nashik. ... ... Respondents

Mrs.A.M.Z. Ansari i/by Mr.Maqsood Khan for Appellant.

Mr.D.S. Mhaispurkar for State.

CORAM : SMT.RANJANA DESAI &
SMT.ROSHAN DALVI, JJ.

Date of reserving the judgment : 31/7/2007
Date of pronouncing the judgment : 29/8/2007
JUDGMENT : (Per Smt. Roshan Dalvi, J.)

1. The Petitioner has applied for a writ of habeas corpus challenging the Detention Order No.PSA 1106/CR-7(2)/SPL-3(A) dated 21st August 2006 in respect of the detention of her husband (detenu) under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA").

2. The detenu is stated to be carrying on business in Dubai since September 2005 in the name and style of Tycoon General Trading. The detenu claims to be a financial consultant. The Petitioner has relied upon the registration of the business of the detenu and the commercial licence issued to him by the Economic Department, Government of Dubai in September 2005.

3. One Suresh Hole, who lives in Pune, is stated to be his best friend and confidante. He was stated to have been given

employment by the detenu. He is the co-detenu and a Detention Order has been passed similarly against him.

4. It is a case of the Respondents that the Detention Order came to be passed against the detenu in this case as well as the co-detenu as they were carrying on illegal and unlawful business in foreign exchange. Foreign exchange to the extent of Rs.1,25,22,750/- came to be forfeited from Suresh Hole. In a statement under Section 108 of the Customs Act recorded by the co-detenu upon his arrest, it came to light that he served and worked for the detenu in the illegal transactions relating to foreign exchange. The detenu was absconding since the arrest of the co-detenu until his own arrest on 3.6.2006.

5. There have been several statements of the detenu as well as co-detenu recorded under Section 108 of the Customs Act as well as a representation made by the detenu and an affidavit filed by the co-detenu. They have been interrogated and questioned about the various aspects of the business of the detenu. The case of the detenu, as reflected in his own

representation, is his own statement recorded under Section 108 of the Customs Act and the retraction statements and the affidavit filed by the co-detenu would determine the merits of the case of the detenu considered by the Detaining Authority and shown to Court. It would be prudent to consider the entire chronology of the events that have transpired leading to the Detention Order to examine its validity.

6. The detenu commenced his business in or about September 2005. This is reflected in the registration certificate and the commercial licence of the detenu which are relied upon by the detenu in his representation dated 15.4.2006 to the Superintendent of Customs (Preventive) Air Intelligence Unit, Mumbai. On 8.12.2005, the detenu admittedly appointed the co-detenu as he is stated to be the only person of his confidence. This is despite the fact that the detenu was carrying on a business in Dubai and the co-detenu lived in Pune and was otherwise employed. The co-detenu was needed to be in Dubai on 27.12.2005. The

detenu, however, could not procure his flight on that day. A flight was booked for him for Sharjah on 28.12.2005. The detenu was supposed to be leaving for Colombo, Sri Lanka on 27.12.2005 and the co-detenu was required to obtain certain cash in USD and AED from the office of the detenu, convert the USD in AED further obtain a loan in AED from one Gimax Middle – East (FZC) Sharjah, UAE (Gimax) and make TT of the combined amount to a party in Hong Kong in respect of the business of the detenu. There is a foreign exchange currency purchase entry dated 28.12.2005 in the name of co-detenu with one Habib Exchange Company L.L.C. for AED 825,300 at 11.19 AM on 28.12.2005 showing the conversion of USD in AED. Having collected the amounts in USD and AED from the office of the detenu, having converted the USD into AED, having obtained a loan of further AED and thus, having collected the entire cash amount in AED, the co-detenu was to make TT (TT) as directed. The collection was complete. The transmission never materialised.

7. It is the case of the co-detenu that he was scheduled to leave for Mumbai on 28.12.2005 by the evening flight and he could not himself undertake the entire transaction to telegraphically transmit the foreign exchange to Hong Kong because he could not obtain the foreign exchange amount in time due to the long lunch break hours in Dubai. Hence, instead of making the TT to the party in Hong Kong, he carried the entire foreign exchange to India. He reached Mumbai on 28.12.2005 and did not declare the foreign exchange which he brought to India. He feared theft of the foreign exchange, if it was declared. He also did not inform the detenu of what he had done or not done. The detenu purportedly received a telephonic complaint from the Hong Kong agent on 3.1.2006 informing that the amount was not transmitted. The detenu, therefore, in haste came to India to confront the co-detenu. Even after confrontation he did not take back the foreign exchange which belonged to him and which was not transmitted to the Hong Kong agent.

8. The co-detenu was to return to Dubai on 8.1.2006. Before

boarding his flight he was intercepted. His bags were checked. Illegal foreign currency was found. A panchanama was made. The foreign currency was seized. The details of the exchange notes in foreign currency aggregating to Rs.1,25,22,750/- came to be forfeited. His statement under Section 108 of the Customs Act was recorded. He was arrested on 9.1.2006. He made a retraction statement by an affidavit of that date. He was remanded to the judicial custody until 20.1.2006. He made no complaint of ill-treatment to the Magistrate, the fact of which came to be endorsed in the order of the Magistrate upon his remand application on 9.1.2006. However, in his retraction statement, he did make allegations of ill-treatment. His affidavit shows the nature of his work and how he associated himself in the business of the detenu with regard to transactions of foreign exchange between the various countries.

9. On 9.1.2006, the Customs Authorities obtained permission to interrogate the co-detenu in jail which came to

be granted. On 10.1.2006, his further statement came to be recorded. The detenu remained in India. He was, however, at large. A letter came to be written by a friend/associate of the detenu urging him to come to Dubai on 16.1.2006. Strangely, the commercial licence for his business came to be granted to the detenu only on 23.1.2006 by the department of Economic Development, Government of Dubai. On 23.1.2006, the co-detenu filed his affidavit which has been the case of the detenu as well as the co-detenu since.

10. On 10.4.2006, the detenu sent a legal notice to the co-detenu threatening to take legal proceedings for his alleged acts which were without the permission and consent of the detenu; no proceedings have been taken by the detenu against the co-detenu however.

11. On 12.4.2006, the co-detenu made a further statement in Marathi after he was granted bail which is in question-answer form and which has been relied upon by the detenu in support of his own case. On 15.4.2006, the detenu

himself made a representation as aforesaid. On 3.5.2006 and 11.5.2006, the co-detenu made his representations.

12. The detenu, who is stated to have been absconding since the arrest of the co-detenu, was arrested on 3.6.2006. His statement under Section 108 of the Customs Act came to be recorded. That has not been retracted. On 7.6.2006 his further statement came to be recorded.

13. On 20.6.2006, a show cause notice came to be issued to the detenu. This was followed by a further statement of co-detenu on 21.6.2006 after he was released on bail.

14. On 4.7.2006 the order under Section 110(2) of the Customs Act came to be passed.

15. On 3.8.2006, the detenu applied for being released on bail since the charge-sheet was not filed against him under the provisions of Section 167 of the Code of Criminal Procedure. He came to be released on bail upon such default upon giving surety to the extent of Rs.One Lac or cash security to that extent. On 21.8.2006, the Detention Order, which has been impugned in this Petition, came to be

issued. That was served upon him on 5.11.2006.

16. It has been the case of the detenu that he was carrying on business related to export of commodities and deals in foreign exchange under valid licences issued by Government of Dubai and under the membership registration certification showing him as a member of the Dubai Chambers of Commerce and Industries, both of which came to be issued since September 2005. (The commercial licence, however, has been issued to the detenu on 23.1.2006 after the arrest of the co-detenu and the seizure of the foreign exchange in this case). It is the case of the detenu that he needed a person of his confidence to deal with the foreign exchange which was required for transacting his business and he chose the co-detenu – Suresh Hole for the said job. Suresh Hole was, therefore, required to travel between India and Dubai for effectuating the transactions of the detenu. One such transaction was required to be made on or about 27th December 2005. He required none other than the co-detenu to effectuate the TT since he was to leave for Colombo, Sri

Lanka. He booked the co-detenu's flight for 28.12.2006. The co-detenu was to take a part of the transaction amount in foreign currency from the office of the detenu and a part by way of loan from a Company giving loans. He was to thereafter telegraphically transmit the amount to an agent in Hong Kong in respect of certain export transactions. He did not do so. He instead brought the foreign exchange into India. Upon his arrival in India on 28.12.2006, he did not inform any one about the same.

17. The detenu received a telephonic complaint from the agent in Hong Kong and decided to follow the co-detenu to confront him. He was not satisfied with the evasive replies given by the co-detenu, he had chosen as his confidante. The money, however, remained with the co-detenu. The co-detenu once again boarded a flight to Dubai when he was intercepted and the foreign exchange was confiscated leading to the saga of the imprisonment of the co-detenu and later the detenu.

18. Hence, the seminal case of the detenu is that instead of

telegraphically tranmitting the amount to Hong Kong as directed, the co-detenu brought otherwise legally usable foreign currency into India without the permission and consent of the detenu.

19. In the age of technological advances that the countries concerned in the transaction are passing through, it remains esoteric how a package of foreign currency is required to be obtained by single individual summoned specifically for the purpose when such forex services are made available by banking institutions between the countries, which require no effort or expense by the customers. Such services were not availed of by the detenu. The case of the detenu brought up in his statement under Section 108 of the Customs Act is required to be appreciated in that light. It would be prudent to note that the detenu's statement has not been retracted. It has to be read along with retraction statement of the co-detenu. The two statements are complimentary. They are, therefore, required to be considered together.

20. Whilst the detenu's statement is as aforesaid, the co-

detenu's retraction statement shows that he indeed left upon being requested by the detenu in respect of the transaction detailed by the detenu himself. He collected the foreign exchange from the office of the detenu. He also obtained the loan of the foreign exchange in another currency required for the TT to be made to the agent in Hong Kong. He, however, did not make the TT through any banking or financial institution offering such forex services. He could not make the TT himself because of the long afternoon siesta in Dubai. He was required to board the flight to India without carrying out the transaction for which he was called by the detenu. Upon arrival in India, he did not make the required declaration for obtaining the foreign currency into India. He was frightened that would result in theft of the currency. He kept it with himself until he was to leave India once again for Dubai when the currency, yet not declared, was found and forfeited. That was, therefore, the currency which otherwise could have been telegraphically transmitted to Hong Kong through a financial agency or a bank in the normal course

for a transaction of export or import between two countries.

21. Upon interrogation of the detenu, it came to be realized by the Respondents that he had the propensity to re-commit such offences due to the nature of his business. Consequently, the preventive Detention Order came to be passed.

22. It is the contention of the detenu that all the documents were not placed before the Detaining Authority to allow the Detaining Authority to come to the correct subjective satisfaction of the reason for his detention. The affidavit-cum-retraction filed by the co-detenu on 23.2.2006 and the representation of the detenu dated 15.4.2006 submitted to the Superintendent of Customs (Preventive) AIU, Mumbai, including the annexures thereto were not before the Detaining Authority. It is, therefore, contended that the Detaining Authority could not come to the subjective satisfaction as to why he should have been detained.

23. The content and purport of the aforesaid two documents which were not before the Detaining Authority and the

resultant consequences of each of them would have to be considered separately.

24. The Affidavit-cum-retraction of the co-detenu shows that he resided in Pune and carried on business since 1984.

He knew the detenu for 25 years and joined him as salesman in his Company in Dubai. His ambition was to become an Exporter in Printing Materials, Millmade and Handmade papers. He visited various countries for survey of the scope of export. (His passport shows entries of such visits as well as visas granted by various countries). It was agreed between the detenu and him that the detenu would provide him a residence visa and a job as a salesman in his company in Dubai upon a salary of AED 4000/- plus air tickets and accommodation and he will help the detenu in exports in India and also for marketing products in UAE and Middle East. His first transaction with the detenu was in December 2005. Certain visa formalities were carried out. His status

on his passport was changed to Non Resident Indian (NRI). He received a telephone call on 24/25th December 2005 from the detenu to reach Dubai on 27th December 2005 since the detenu had to leave for Colombo. The detenu was to hand over some amount to him and he was to collect sum other amount from another company and send a TT to a company in Hong Kong against the consignment of certain Laptops. He could not go to Dubai on 27th December 2005 and hence, his flight was booked on 28.12.2005 from Mumbai to Sharjah. That was to be his first flight for his work as salesman or otherwise of the detenu. Upon reaching Dubai, he went to the detenu's office and collected AED 39700/- and USD 225000/- . He also converted the amount of USD into AED from Habib Exchange Company in Dubai. He proceeded to Sharjah to collect the remaining amount of AED 200000/- from M/s.Gimax as per the letter of authority given by the detenu. He received AED 1,90,000/- from that company. That payment came to be delayed as the Exchange House closed for lunch break. He had to catch the

flight back to India from Sharjah at 16:40 hours and hence, he could not make the TT required. The very purpose of his having been summoned to Dubai was completely frustrated. The work that he had to carry out is not the work of a salesman. He returned to India and kept with him the foreign exchange which was otherwise not to be brought into India as aforesaid, which ultimately came to be forfeited.

25. The statement of the detenu is much in the same light. It has been stated to the Custom Authorities since the inception. It is pertinent to note that the detenu has been asked specifically why this cumbersome procedure for manual collection of foreign exchange was required to be made by him in preference to the easier mode of obtaining TT and also why if a TT was to be made to the agent in Hong Kong, it could not have been made by him and why he required the services of the co-detenu from Pune to be summoned to Dubai for being sent to Sharjah for collection of the amount which ultimately never come to be transmitted as required. It is the case of the Respondents

that the detenu has not given any satisfactory reply to this pertinent query which shall be dealt with presently.

26. It can be seen that though the retraction statement of the co-detenu was not before the Detaining Authority, the fact of he having made so, was known to the Detaining Authority and has been recited as such. The entire content of the retraction statement containing each of the details of the transaction of the case made out by the detenu as well as the co-detenu was known to the Detaining Authority and has been relied upon as such. It, therefore, cannot alter the subjective satisfaction of the Detaining Authority for not having had the very same statement, the contents of which are before the Detaining Authority in the other statements of the co-detenu, more specially the later statement made by him in Marathi on 21.6.2006, which contains the same facts and details.

27. It is the further contention of the detenu that his own representation dated 15.4.2006, which was made to the Superintendent of Customs, contains his entire say along

with the annexures. The annexures were the documents showing his business as well as other documents with regard to the transaction and more specially in respect of the co-detenu. Since the representation was not before the Detaining Authority, the very foundation of this case came to be missed by the Detaining Authority in appreciating the style and substance of his business. The representation of the detenu speaks about how he needed a man of his trust and confidence which he found in none other than the co-detenu for carrying out his business, how the employment was offered to the co-detenu and visa was procured for him, how he had to leave for Colombo on 27.12.2005 and required the co-detenu to “complete the job” relating to the procurement of the foreign exchange, including cash available with himself and the cash to be procured on loan. The first and the only transaction between the parties has been set out in his representation to show the kind of regular employment that was provided by the detenu to the co-detenu for the purposes of his business. It, therefore,

shows the nature of the detenu's business and how the simple transaction of a TT was required to be manually carried out by his confidante/agent in his absence.

28. The documents annexed to the representation are the commercial licence dated 29.9.2005, can be grouped and classified as : documents of his business, documents of the detenu wholly unrelated to his business, the documents of the concerned transaction. The documents of his business are :

(1) the certificate of one Euro-Gulf International (FZC) dated 1.10.2005 showing the detenu's previous holding in their company as an Executive Director,

(2) the certificate of registration of the detenu's business in the commercial register of the Department of Economic Development, Government of Dubai issued on 21.9.2005,

(3) the membership registration certificate issued by the Chamber of Commerce & Industry, Dubai on

26.9.2005 to the detenu, and

(4) the commercial licence issued to the detenu on 23.1.2006 by the Department of Economic Development, Government of Dubai.

The other wholly unrelated documents are :

(1) tenancy contract of the detenu with his landlord executed on 12.9.2005,

(2) the detenu's passport,

(3) the notice issued upon the co-detenu on 10.4.2006, well after the arrest of the co-detenu, and

(4) a letter of the detenu's friend one Momhamed Hasan urging the detenu to come to Dubai on 16.1.2006.

The only documents concerning the transaction in issue are :

(1) the foreign currency purchase made by the co-detenu on 28.12.2005 for AED 8,25,300/- and

(2) the receipt of AED 1,90,000 from Gimax by the co-detenu.

The last document annexed to the representation of the

detenu is affidavit of the co-detenu.

29. It may be mentioned that the documents of his business show the nature of his business which came to be registered with the Government of Dubai and not the nature of the transaction, for which the detenu as well as the co-detenu came under fire from the Customs Authorities. All that these documents reflect is that the detenu's business in Dubai was licensed or certified by the Government of Dubai. That has nothing to do with the transaction for which the Respondents initiated action in India. In this case, all that is required to be seen is whether the transaction is hit by the Foreign Exchange Regulations in India. Similarly the tenancy contract is of little importance, as also his passport, in understanding the nature of the transaction. The notice of legal proceedings given to the co-detenu as late as in April 2006, for which no steps have been taken before or since also assumes little or no importance. Even the letter of his friend to the detenu urging him to come to Dubai for other

business transactions is of no material value. The only relevant documents are the entry relating to the foreign exchange cash purchase and the receipt of land AED from Gimax signed by the co-detenu. Both of them have been considered by the Detaining Authority.

30. It is, therefore, seen that the Detaining Authority has been fully apprised of the case of the detenu. Based upon the detenu's own statement, supported by the statement of the co-detenu, the Detention Order has been passed. The subjective satisfaction of the Detaining Authority, therefore, cannot be faulted on the premise that any material fact was not brought to her notice. Consequently, the contention on behalf of the detenu that vital documents were not placed before the Detaining Authority cannot be accepted, the statement dated 3.6.2006 of the detenu recorded under Section 108 of the Customs Act upon his arrest and which has never been retracted having contained verbatim the facts stated in his representation.

31. It is contended on behalf of the detenu that even

though the detenu has explained each of the questions put before him, the Detaining Authority has simply stated that he has not given any satisfactory explanation to the question as to why he did not make the TT himself and why he needed the co-detenu to come from Pune to Dubai to do that work. The very answer of the detenu requires to be reproduced.

> " I do not have any other employee working there except Shri Hole at the moment & I could not effect this job because the funds which were to be collected from Gimax Middle East (FZC) could be available only on 28/10/05 & that only the telegraphic transfer of US $ 2,63,000/- totally was possible."

Aside from the fact that making of the TT in the year 2005-2006 required only a simple form to be filed in any bank or financial institution rendering forex services and can be done by debiting the account of the transmittor himself and does not call for the cumbersome procedure of actually taking a bag containing the currency notes aggregating to huge amount of Rs.1.25 Crores, the reason

required for the detenu to engage the services of none other than the co-detenu in the aforesaid answer is neither intelligible nor comprehensible. It is only an attempt to evade the question which nails the issue. In fact, this dis-satisfactory answer itself shows that the subjective satisfaction of the Detaining Authority on the merits of the case is correctly reached.

32. Mrs.Ansari relied on a judgment in the case of **Shri Ashok Manalal Mehta vs. Shri L. Umingliana in Criminal Writ Petition No.482 of 1991** dated 29.8.1991 in which the Division Bench of this Court held that the reply to show cause notice is a vital piece of document and if not placed before the Detaining Authority the order was liable to be set aside. Indeed it is. If the Detaining Authority does not have the very defence of the detenu before him or her, the Detention Order would certainly be erroneous. If however, all the vital documents, including the statement of detenu himself are before the Detaining Authority and are

considered by the Detaining Authority, coupled with the very question which the detenu has taken exception to and his answer thereto, non placement of similar representations made with documents unrelated to the transactions, for which he was sought to be detained, would not vitiate the Detention Order. The observation in that judgment that the Detaining Authority, upon seeing that the reply sent to the show cause notice, should have himself called for that document, does not apply since in this case the Detaining Authority had the very statement of the detenu.

33. Mrs.Ansari then relied upon a judgment in the case of **Madan Lal Anand vs. Union of India & ors (1990) 1 SCC 81** in which several documents, which could influence the subjective satisfaction of the Detaining Authority, were not placed before him. That was considered fatal to the case. Those documents were an abeyance order against the Firm of the detenu, an order suspending the operation of certain import licences granted to him and show cause notices

issued. The documents, in this case which are annexed to the reply to the Show Cause Notice dated 15th April 2006 of the detenu, are only, the documents relating to his business and other unrelated documents except the aforesaid two documents relating to the transaction in issue which were considered by the Detaining Authority to understand the transaction. Hence, mechanically enumerating the documents not before the Detaining Authority and striking off the entire effort of the Detaining Authority on such a technical plea, would be failure of justice.

34. Similarly in the case of **Ahamed Nassar vs. State of Tamil Nadu & ors. AIR 1999 SC 3897**, the Apex Court has considered the merits of the documents not placed before the Detaining Authority and the consequences of such non-placement. In paragraph 25 of that judgment, it has been observed that the aspect of retraction by the detenu was found in his bail application which could not materially alter the subjective satisfaction of the Detaining Authority. However, there were other matters in the letters of the

detenu written to the Authorities which showed facts which did not find a place in such bail application. The detenu in that case had specifically contended that the seized goods were not prohibited goods which passed through the red channel and the detenu had offered to pay custom duty thereon but the officer did not heed such such offer and arrested the detenu. That was the additional material found in the letters of the detenu and not in the bail application or any other papers placed before the Detaining Authority. That was the material which could have swayed the subjective satisfaction of the Detaining Authority. Hence, it was held that not placing those facts by the Sponsoring Authority before the Detaining Authority, vitiated the Detention Order. In this case, the statement of the co-detenu in Marathi shows his part in the transaction. The other arm of the transaction is reflected in the statement of the detenu himself. No further material with regard to that statement is either in the retraction statement of the co-detenu or in the reply of the detenu to show cause notice.

Hence, the order, in this case, is not liable to be vitiated on the ground that the detenu himself had produced other documents unrelated to the transaction or other extraneous and irrelevant documents such as his tenancy agreement and the alike.

35. In the case of **Ayya alias Ayub vs. State of U.P. & anr. AIR 1989 SC 364** the time of the arrest of the detenu was disputed and a telegram sent on the date of the arrest showing a different time was held to be a material document which remained to be placed before the Detaining Authority. There is no such document in this case.

36. Mrs.Ansari relied upon a judgment in the case of **Ramesh Chandra Gupta vs. State of U.P. & anr. 1983 Criminal Law Journal 184** to show that though the gist of the statement of a witness (driver) was mentioned in the recovery memo, the statement of the driver not having been put up before the Detaining Authority, the order came to be vitiated. We have gone through this judgment. We find that the contention is incorrect. In paragraph 8 of the judgment,

there is a clear observation that the recovery memo did not contain a gist of the statement of the driver. Since even a gist of the statement of the witness was not before the Detaining Authority, the conclusion arrived at could be vitiated. In this case, not only a gist but the entire statement of the detenu as well as the co-detenu has been considered by the Detaining Authority.

37. It is contended by Mrs.Ansari on behalf of the detenu that the documents annexed to the detenu's reply not having been relied upon by the Detaining Authority, have not even been supplied to the detenu in the list of documents supplied by the Detaining Authority. She relied upon the case of **Thakor Mulchandani vs. Assistant Secretary to the Govt. of Maharashtra & ors. AIR 1982 SC 1221** to contend that for non-supply of documents an effective representation could not have been made by the detenu which vitiated the Detention Order. In that case, the Detaining Authority had relied upon a slip recovered from the detenu showing a summary of account which showed the

transaction of the detenu relating to smuggling of account which was alleged. This account of the smuggled goods was relied upon by the Detaining Authority, but the slip showing the account was not supplied to the detenu. In this case, there is no document relied upon by the Detaining Authority which has not been supplied to the detenu and hence, reasoning in the judgment does not apply to the facts of this case.

38. The other contention raised on behalf of the detenu is that the detenu was released on bail on 4.8.2006. Though the Detention Order was passed after about 17 days on 21.8.2006, the Detention Order states that the detenu was, until then, in jail. It is argued that this vitiates the Detention Order on the ground of non-application of mind.

39. The Detaining Authority has stated in her Affidavit that the bail was not granted on merits of the case. It was granted by default since the chargesheet was not filed within the statutory period mentioned in Section 167 of the Code of Criminal Procedure. It was not known when the bail amount

of Rs.1 Lac was furnished by the detenu. She was not informed by the Sponsoring Authority about the factum of the grant of the bail or the detenu availing of the bail granted to him.

40. If she was informed about the aspect of bail and yet mentioned in her Detention Order that the detenu was in jail, it might reflect non-application of mind to at-least some of the aspects put up before her by the Sponsoring Authority. That is not the case here. In any event, the Detention Order would be merited if the detenu is, in fact, released on bail. If the detenu continues to be in jail and the Detention Order is passed and is required to be served upon him in jail itself, it would not make any difference to the case of detenu. Had it been the reverse case and the detenu was in jail, but the Detention Order was passed on the premise that since he is on bail he should be detained, the decision of the Detaining Authority based on such a fact would have been a relevant factor to consider her non-application of mind. Besides, even if the detenu remains in jail on the date

of the Detention Order, the Detention Order could always be passed as it would come into practical operation so soon as the detenu would be released on bail. The consideration of the material for the passing of the Detention Order or its actual passing is not determined upon whether or not the detenu continues to be in jail. It is, therefore, not a circumstance to *ipso facto* lead to the conclusion about the non-application of mind. It could, at best, be one of the relevant factors, in a given case, to be considered for coming to the conclusion as to whether the Detaining Authority, in fact, applied his or her mind before the order came to be passed.

41. Mr.Mhaispurkar on behalf of the Respondents contended that the awareness of the custody of the detenu is the only essential factor. Whether the fact of the grant of bail is vital or not depends upon the facts and circumstances of the case.

42. Mrs. Ansari, learned Counsel for the detenu, relied on certain unreported judgments of this Court relating to the

aspect of the incorrect mention of the custodial position of the detenu.

43. Firstly, she relied upon a judgment in the case of **Guru Swami Peerummal vs. Shri V.K. Saraf & anr. Criminal Writ Petition No.444 of 1989**. A Division Bench of this Court in the judgment dated 26.6.1989 observed that the grounds of detention recited the fact that the detenu was arrested; there was no reference to the bail application made by the detenu or the release order passed by the Magistrate. The grounds of detention, which are a mirror of the subjective satisfaction of the Detaining Authority, showed that the Detaining Authority did have knowledge about the bail application being preferred by the detenu and the order of his release and though those documents were considered by the Detaining Authority, a mention of the same was not made. Under those circumstances, it was held that there was non-application of mind by the Detaining Authority.

44. In the case of **Smt.Vimal Mukesh Saxena vs. The State of Maharashtra & ors. in Criminal Writ Petition**

No.1129 of 2000, the Division Bench of this Court in the judgment dated 21.11.2000, considered the case where the detenu, though not absconding, was recorded to have absconded. The Division Bench further observed that since he was shown absconding, the Detaining Authority was satisfied that unless he was detained, he would continue to engage in prejudicial activities in future. The detenu was, in fact, ordered to be released on bail which facility he had already availed. It was, therefore, held that the fact that the detenu was not absconding, was a material circumstance which was read incorrectly by the Detaining Authority vitiating the order by non-application of mind.

45. We find that, in this case, the detenu was not released on bail upon considering the merits of his case. The Detaining Authority, therefore, could not have been abreast of the merits of the case of the detenu for being released on bail. The detenu was released on bail upon default of the State under Section 167 of the Criminal Procedure Code. The Detaining Authority was specifically not informed of the fact

of the bail being granted or availed of by the detenu. The order of detention, therefore, cannot be vitiated by non-application of mind. Besides, it did not matter that the detenu was not in jail but was released a bail, since the order of detention became more opportune upon his release. The Detaining Authority passed the order based upon the very statement of the detenu himself which reflected a clear position about his business activities admittedly stated by him and which had a propensity for repetition.

46. In any event, the condition of bail which required him to give a surety or cash security of Rs.One Lac would not prevent him from indulging in the such activities in future, specially in case of transactions having stakes of crores of rupees.

47. The challenges to the Detention Order are not sustainable. The Detention Order is not vitiated on any ground.

48. Consequently, the writ of habeas corpus, prayed for by the detenu, cannot be granted. The Petition is dismissed.

Rule stands discharged. No order as to costs.

(SMT.RANJANA DESAI, J.)

(SMT.ROSHAN DALVI, J.)